



# COMMONWEALTH of VIRGINIA

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## MEMORANDUM

**TO:** Karin Clark  
Virginia Department of Social Services

**FROM:** Jennifer C. Williamson   
Senior Assistant Attorney General

**DATE:** November 16, 2018

**SUBJECT:** Fast-track Review of Regulation for Investigation of Child Abuse and Neglect in Out of Family Complaints; 22VAC40-730

I am in receipt of the attached regulations, which you have asked the Office of the Attorney General to review to determine if the State Board of Social Services ("State Board") has the statutory authority to promulgate the specified regulations and whether the specified regulations comport with applicable state law.

Pursuant to Va. Code § 63.2-217, the State Board is required to promulgate regulations as may be necessary or desirable to carry out the purposes of Title 63.2 of the Code of Virginia. Consequently, it is my opinion that the State Board has the authority to promulgate these regulations, subject to compliance with the provisions of Article 2 of the Administrative Process Act and Executive Order 14 (2018) (amended) and the State Board has not exceeded that authority.

If you have any questions, please feel free to call me at 225-3197.

Attachment

**Project 5668 - Fast-Track**

**DEPARTMENT OF SOCIAL SERVICES**

**Amend Investigation of Child Abuse and Neglect in Out of Family Complaints**

Part I

Definitions

**22VAC40-730-10. Definitions.**

In addition to the definitions contained in 22VAC40-705-10, the following words and terms when used in conjunction with this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Child day program" means a regularly operating service arrangement for children where, during the absence of a parent or guardian, a person or organization has agreed to assume responsibility for the supervision, protection, and well-being of children as defined in ~~§ 63.2-100 of the Code of Virginia~~ a child under the age of 13 for less than a 24-hour period.

"Child-placing agency" means any person who places children in foster homes, adoptive homes or independent living arrangements pursuant to § 63.2-1819 or a local board that places children in foster homes or adoptive homes pursuant to §§ 63.2-900, 63.2-903, and 63.2-1221. Officers, employees, or agents of the Commonwealth, or any locality acting within the scope of their authority as such, who serve as or maintain a child-placing agency, shall not be required to be licensed.

"Facility" means the generic term used to describe the setting in out of family abuse or neglect and for the purposes of this regulation includes schools (public and private), private or state-operated hospitals or institutions, licensed or religiously exempted child day programs, and residential facilities.

"Facility administrator" means the on-site individual responsible for the day-to-day operation of the facility.

"Foster home" means a residence licensed by a child-placing agency in which any child, other than a child by birth or adoption of such person, resides as a member of the household.

"Participate" means to take part in the activities of the joint investigation as per a plan for investigation developed by the CPS worker with the facility administrator or regulatory authority or both.

"Physical plant" means the physical structure/premises of the facility.

"Regulatory authority" means the department or state board that is responsible under the Code of Virginia for the licensure or certification of a facility for children.

"Residential facility" means a publicly or privately owned facility, other than a private family home, where 24-hour care, maintenance, protection, and guidance is provided to children separated from their parents or legal guardians, that is subject to licensure or certification pursuant to the provisions of the Code of Virginia ~~and includes, but is not limited to, group homes, secure facilities, temporary care facilities, and respite care facilities.~~

## Part II

### Policy

#### Article 1

##### Out of Family Investigation Policy

#### **22VAC40-730-20. General.**

~~Valid~~ For the purpose of this chapter, valid complaints of child abuse or neglect involving caretakers in out of family settings ~~are for the purpose of this chapter valid complaints in state licensed and religiously exempted child day programs, private and public schools, residential~~

~~facilities, hospitals, or institutions. These valid complaints in a facility or foster home shall be investigated by qualified staff employed by local departments of social services.~~

~~Staff shall be determined to be qualified based on criteria identified completion of an out of family training course as approved by the department Department. All staff involved in investigating a valid complaint must be qualified.~~

This regulation is limited in scope to the topics contained ~~herein~~ in this chapter. All issues regarding investigations, findings and appeals are found in Child Protective Services, 22VAC40-705, and as such are cross referenced and incorporated into and apply to out of family cases to the extent that they are not inconsistent with this regulation.

~~In addition to the authorities and the responsibilities specified in department policy for all child protective services investigations, the policy for investigations in out of family settings is set out in 22VAC40-730-30 through 22VAC40-730-130.~~

#### **22VAC40-730-40. Involvement of regulatory agencies.**

The authority of the local department to investigate valid complaints of alleged child abuse or neglect in ~~regulated facilities~~ or foster homes overlaps with the authority of the public agencies which have regulatory responsibilities for these facilities to investigate alleged violations of standards.

1. For valid complaints in ~~state regulated facilities and religiously exempted child day programs~~, the local department shall contact the appropriate regulatory authority and share the valid complaint information. The regulatory authority will appoint a staff person to participate in the investigation to determine if there are regulatory concerns.
2. The assigned CPS worker ~~assigned to investigate~~ and the appointed regulatory staff person will discuss their preliminary joint investigation plan.

a. The CPS worker and the regulatory staff person shall review their respective needs for information and plan the investigation based on when these needs coincide and can be met with joint interviews or with information sharing.

b. The investigation plan must keep in focus the policy requirements to be met by each party the CPS worker and regulatory authority as well as the impact the investigation will have on the facility's staff, the victim child or children, and the other children at the facility.

**22VAC40-730-60. Contact with CPS CPS regional coordinator.**

A. The local department shall contact the ~~department's~~ Department's regional CPS coordinator as soon as is practical after the receipt of the valid complaint. The regional coordinator will review the procedures to be used in investigating the valid complaint and provide any case planning assistance the local worker may need.

B. The regional coordinator shall be responsible for monitoring the investigative process and shall be kept informed of developments which substantially change the original case plan.

C. At the conclusion of the investigation the local department shall contact the ~~department's~~ Department's regional CPS coordinator to review the case prior to notifying anyone of the disposition. The regional coordinator shall review the facts gathered and policy requirements for determining whether or not abuse or neglect occurred. However, the statutory authority for the disposition rests with the local department. This review shall not interfere with the requirement to complete the investigation in the legislatively mandated time frame.

**22VAC40-730-70. Contact with the facility administrator.**

A. The CPS worker shall initiate contact with the facility administrator or designee at the onset of the investigation.

B. The CPS worker shall inform the facility administrator or his designee of the details of the valid complaint. When the administrator or designee chooses to participate in the joint investigation, he will be invited to participate in developing the plan for investigation, including decisions about who is to be present in interviews. If the administrator or designee is the alleged abuser or neglecter, this contact should be initiated with the individual's superior, which may be the board of directors, etc. ~~If or, if~~ there is no superior, the CPS worker may use discretion in sharing information with the administrator so long as such disclosure is consistent with and does not conflict with law or regulation.

C. Arrangements are to be made for:

1. Necessary interviews;
2. Observations including the physical plant; and
3. Access to information, including review of pertinent policies and procedures.

D. The CPS worker shall keep the facility administrator or designee apprised of the progress of the investigation. In a joint investigation with a regulatory staff person, either party may fulfill this requirement.

**22VAC40-730-115. Procedures for conducting an investigation of a teacher, principal or other person employed by a local school board or employed in a nonresidential school operated by the Commonwealth.**

A. Each local department of social services and local school division shall adopt a written interagency agreement as a protocol for investigating child abuse and neglect reports against school personnel. The interagency agreement shall be based on recommended procedures for conducting investigations developed by the Departments of Education and Social Services.

B. These procedures for investigating school personnel amplify or clarify other Child Protection Services (CPS) regulations.

~~1. In determining the validity of a report of suspected abuse or neglect pursuant to § 63.2-1511 of the Code of Virginia, the local department must consider whether the school employee used reasonable and necessary force. The use of reasonable and necessary force does not constitute a valid report If a teacher, principal or other person employed by a local school board or employed in a school operated by the Commonwealth is suspected of abusing or neglecting a child in the course of his educational employment, the complaint shall be investigated in accordance with §§ 63.2-1503, 63.2-1505 and 63.2-1516.1. Pursuant to § 22.1-279.1, no teacher, principal or other person employed by a school board or employed in a school operated by the Commonwealth shall subject a student to corporal punishment. However, this prohibition of corporal punishment shall not be deemed to prevent (i) the use of incidental, minor or reasonable physical contact or other actions designed to maintain order and control; (ii) the use of reasonable and necessary force to quell a disturbance or remove a student from the scene of a disturbance that threatens physical injury to persons or damage to property; (iii) the use of reasonable and necessary force to prevent a student from inflicting physical harm on himself; (iv) the use of reasonable and necessary force for self-defense or the defense of others; or (v) the use of reasonable and necessary force to obtain possession of weapons or other dangerous objects or controlled substances or paraphernalia that are upon the person of the student or within his control. In determining whether the actions of a teacher, principal or other person employed by a school board or employed in a school operated by the Commonwealth are within the exceptions provided in this section, the local department shall examine whether the actions at the time of the event that were made by such person were reasonable.~~

~~2. The local department shall conduct a face-to-face interview with the person who is the subject of the valid complaint or report alleged abuser or neglector.~~

~~3. At the onset of the initial interview with the alleged abuser or neglecter, the local department shall notify him in writing of the general nature of the valid complaint and the identity of the alleged child victim regarding the purpose of the contacts.~~

~~4. The written notification shall include the information that the alleged abuser or neglecter has the right to have an attorney or other representative of his choice present during his interviews. However, the failure by a representative of the Department of Social Services to so advise the subject of the valid complaint shall not cause an otherwise voluntary statement to be inadmissible in a criminal proceeding.~~

52. If the local department determines that the alleged abuser's actions were within the scope of his employment and were taken in good faith in the course of supervision, care or discipline of students, then the standard for determining a founded finding of abuse or neglect is whether such acts or omissions constituted gross negligence or willful misconduct.

~~6. Written notification of the findings shall be submitted to the alleged abuser or neglecter. The notification shall include a summary of the investigation and an explanation of how the information gathered supports the disposition.~~

~~7. The written notification of the findings shall inform the alleged abuser or neglecter of his right to appeal.~~

~~8. The written notification of the findings shall inform the alleged abuser or neglecter of his right to review information about himself in the record with the following exceptions:~~

- ~~a. The identity of the person making the report.~~
- ~~b. Information provided by any law enforcement official.~~
- ~~c. Information that may endanger the well-being of the child.~~

~~d. The identity of a witness or any other person if such release may endanger the life or safety of such witness or person.~~

~~No information shall be released by the local department in cases that are being criminally investigated unless the release is authorized by the investigating law enforcement officer or his supervisor or the local attorney for the Commonwealth.~~

**22VAC40-730-120. Monitoring of cases for compliance. (Repealed.)**

~~A sample of cases will be reviewed by department staff to ensure compliance with policies and procedures.~~

Article 2

Local Staff Qualifications in Out of Family Investigations

**22VAC40-730-130. Requirements.**

A. In order to be determined qualified to conduct investigations in out of family settings, local CPS workers shall meet minimum education standards established by the department Department including:

- ~~1. Documented competency in designated general knowledge and skills and specified out of family knowledge and skills; and~~
- ~~2. Completion completion of an out of family policy training course as approved by the Department.~~

B. The department Department and each local department shall maintain a roster of personnel determined qualified to conduct these out of family investigations.

**22VAC40-730-140. Protocol for out of family investigations.**

For out of family investigations, the following shall be completed, which are consistent with 22VAC-40-705:

1. The local department shall conduct a face-to-face interview with the alleged abuser or neglector.

2. At the onset of the initial interview with the alleged abuser or neglector, the local department shall notify him in writing of the general nature of the valid complaint and the identity of the alleged child victim regarding the purpose of the contacts.

3. The written notification shall include the information that the alleged abuser or neglector has the right to have an attorney or other representative of his choice present during his interviews.

4. If the alleged abuser or neglector has been arrested, statements, or any evidence derived therefrom, made to local department child-protective services personnel, or to any person performing the duties of such personnel, by any person accused of the abuse, injury, neglect or death of a child after the arrest of such person, shall not be used in evidence in the case-in-chief against such person in the criminal proceeding on the question of guilt or innocence over the objection of the accused, unless the statement was made after such person was fully advised (i) of his right to remain silent, (ii) that anything he says may be used against him in a court of law, (iii) that he has a right to the presence of an attorney during any interviews, and (iv) that if he cannot afford an attorney, one will be appointed for him prior to any questioning.

5. The written notification of the findings shall inform the alleged abuser or neglector of his right to appeal.

6. The written notification of the findings shall inform the alleged abuser or neglector of his right to review information about himself in the record with the following exceptions:

a. The identity of the person making the report.

b. Information provided by any law-enforcement official.

c. Information that may endanger the well-being of the child.

d. The identity of a witness or any other person if such release may endanger the life or safety of such witness or person.

7. No information shall be released by the local department in cases that are being criminally investigated unless the release is authorized by the investigating law-enforcement officer or his supervisor or the local attorney for the Commonwealth.